2-23-1859

Report : The Court of Claims

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 3, 1859.—Referred to the Committee on Claims.
FEBRUARY 4, 1859.—Discharged and referred to Committee on Indian Affairs
FEBRUARY 23, 1859.—Committee discharged.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

1. The petition of the claimant and amended petition.
2. Articles of agreement between O. M. Wozencraft and claimant transmitted to House of Representatives.
3. Original bills of exchange in favor of claimant, on which the claim is preferred, transmitted to House of Representatives.
4. Depositions filed in the case, and numbered 1, 2, 3, 4, 5, 6 and 7, transmitted to House of Representatives.
5. Claimant's brief.
6. United States Solicitor's brief.
7. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said Court, at Washington, this third day of February, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the Judges of the Court of Claims of the United States of America, established by the act of Congress approved 24th of February, in the year 1855:

Your petitioner, Samuel J. Hensley, a citizen of the State of California, and therein residing, most respectfully represents to this Court:

That in the year 1850, the white men had overspread the greater

part of the State of California; had intruded upon the lands occupied by the Indians; had driven them from their dwellings, hunting grounds, valleys, and fisheries, into barren mountains, where even the resource of acorns was wanting to supply their craving appetites. By reason thereof the Indians became exceedingly hostile, robbing and murdering the whites, which caused the whites to retaliate, and thus a predatory, sanguinary warfare between the Indians and the white men was raging.

Under these circumstances, the government of the United States was called to perform its moral duties, of protecting and feeding the Indians, over whom the United States claimed the jurisdiction and authority of a guardian over his ward; and of preventing the whites from obtruding upon lands to which the Indian right of occupancy had not been extinguished, neither to the United States nor to any other government; and also of producing a state of peace between the Indians within the bounds of the State of California and the whites, who were attracted from all parts of the United States, and from foreign lands, in search of gold which was abundant in the lands occupied by the Indians.

Therefore, the Congress of the United States, by act approved September 30, 1850, (IX Stat. at Large, by L. and B., p. 558,) appropriated money "to enable the President to hold treaties with the various Indian tribes in the State of California;" and President Fillmore appointed three commissioners, viz: Reddick McKee, G. W. Barbour, and O. M. Wozencraft, to hold treaties with the various tribes of Indians in the State of California.

The instructions to these commissioners have not been made public, but it is to be presumed that the commissioners had discretionary powers and trusts commensurate with the exigencies, whereby to bring the Indians into a mood to treat, and to pacify them until the President and Senate should approve or disapprove the treaties which should be made.

These commissioners (as your petitioner is informed and believes, and so believing charges) arrived in California early in January, 1851, and entered upon their duties. The Indians would not consent to treat unless their pressing necessities for food were at once relieved, and promises given of future supplies. The commissioners soon dissolved the board wherein they were acting jointly, and divided the State into three districts, in which they acted separately. Numerous treaties were made in these districts by the respective commissioners with the various tribes or bands of Indians within the said districts, in each of which cases the Indians were not only furnished with food during the times of treating, but the treaties stipulated for further and future supplies in times to come. These very numerous treaties were, as it is understood, rejected by the Senate, and so they have never been published; wherefore your petitioner cannot now speak of their contents with any greater certainty.

On the 10th day of February, 1852, O. M. Wozencraft, who was one of the commissioners aforesaid, (and also an Indian agent,) using the discretionary powers in him vested as commissioner, and urged by the provisions of the treaties, and by the pressing wants of the Indians

for food, and to prevent them from choosing between starvation and plundering, robbing, and murdering of the whites, purchased of your petitioner, Samuel J. Hensley, nineteen hundred head of cattle for beef, to be delivered between the Mokuelumne river and the Four rivers, when, and as the same should be required by said Wozencraft, at the price of fifteen cents per pound, to be paid in bills drawn by said agent of the government upon the Secretary of the Interior, as more fully appears by the written contract of that date, mutually signed and sealed, and herewith shown, marked Exhibit A.

Your petitioner avers, that in accordance with said contract he delivered the said nineteen hundred head of beef cattle, weighing eight hundred and eighty-three thousand three hundred and thirty-three pounds and one-third of a pound, (883,333⅓ lbs.,) which at the contract price of fifteen cents per pound amounted to the sum of one hundred and thirty-two thousand five hundred dollars; and therefore the said Wozencraft gave your petitioner seven bills, drawn in his official capacity, on the Secretary of the Department of the Interior, dated on the eleventh day of February, 1852, payable to the order of your petitioner one day after date, whereof one of said bills was for fifty thousand dollars, ($50,000,) another for forty-nine thousand dollars, ($49,000,) a third for fifteen thousand dollars, ($15,000,) a fourth for ten thousand dollars, ($10,000,) a fifth for two thousand dollars, ($2,000,) a sixth for four thousand five hundred dollars, ($4,500,) and the seventh for two thousand dollars, ($2,000,) making together the said sum of one hundred and thirty-two thousand five hundred dollars, the price of the beef cattle so as aforesaid delivered at the contract price of fifteen cents per pound.

These bills were presented for payment to the Secretary of the Interior, and for want of an appropriation of money by Congress, for payment thereof, they were protested for non-acceptance and non-payment, in the month of March, 1852, and yet remain wholly unpaid, and are the property of your petitioner, and will be produced in due time to this court.

Your petitioner states that the said price of fifteen cents per pound was very low, the price of beef being at the time twenty-five cents per pound generally in that part of California; and he relies upon the absolute necessity of that supply of beef to feed the Indians; upon the moral obligation of the government to furnish it; upon the discretionary powers confided to the commissioners and incident to the business for which they were appointed and sent; the benefit resulting therefrom to the people and government of the United States in keeping the Indians from robbing, shooting, and killing the white people, who were acquiring millions of gold from the lands of the Indians, to which the Indian right of occupancy had not been extinguished, and upon the confidence which this petitioner and others justly and rightfully reposed in the public officers of the government, duly appointed and sent to treat with the Indians, and to put a stop to the warfare then raging to a grievous extent between the Indians and the white people, the Indians robbing, shooting, and killing the whites, and they retaliating by pursuing, attacking, and slaughtering the Indians.

Your petitioner prays that the solicitor for the United States appointed to represent the government before this honorable Court may be required to answer to this petition; that such proceedings may be had thereon as justice and equity require, and that on the final hearing this Court will grant to your petitioner such relief as his case merits.

R. ROSE,
GEORGE M. BIBB,
For the petitioner.

IN THE COURT OF CLAIMS.

AMENDED PETITION FILED BY LEAVE OF COURT.

And the said petitioner, Samuel J. Hensley, by leave of court, first had and obtained, in addition to the facts set forth in his original petition, saith that he was at the date thereof the sole owner of the claims therein preferred, and that since that date one James Fields has become interested in the same to the extent of one-half, and that Aristides Welsh is interested under Fields, but to what extent he does not know.

DISTRICT OF COLUMBIA, } *ss.*
County of Washington, }

Robert Rose, agent and of counsel for the above named petitioner deposeth and saith that the facts above set forth are true, as he verily believes.

ROBERT ROSE.

IN THE COURT OF CLAIMS.

ON THE PETITION OF SAMUEL J. HENSLEY.

Brief of Montgomery Blair, of Counsel for Claimant, on the reargument of the case, November term, 1858.

This claim originated in an agreement between Hensley, the claimant, and O. M. Wozencraft, Indian agent of the United States in California, dated 10th February, 1852, by which Hensley contracted to deliver nineteen hundred head of beef cattle, averaging 500 pounds in weight, on the Mokuelumne and Four rivers, and Wozencraft agreed on behalf of the United States to pay therefor at the rate of fifteen cents per pound.

The proof shows that 1,713 head of the cattle, averaging 500 pounds in weight, making a total of 856,500 pounds of beef, were delivered under this contract, 1,285 head to Wozencraft, and 428 head to Beale, his successor, (see depositions of M. B. Lewis, Lewis Leach, L. D. Vinsenhaler, and Wozencraft; also that of Beale, taken on the part of the United States;) for which, at fifteen cents per pound, which it is not denied is a reasonable rate, there is due the sum of $128,475.

Under ordinary circumstances the claimant would have stopped with proving the delivery of the cattle; but as the conduct of agent Wozencraft had been severely criticised by Superintendent Beale, in respect to some other transactions, in his report dated 25th Feb-

ruary, 1853, Ex. Doc. 57, 2d session 32d Congress, (hereinafter referred to as Doc. 57,) the claimant thought it proper to show, not only the delivery to Wozencraft, but that Wozencraft had actually fed 1,073 of the cattle to the Indians, and turned over 212, the remainder of the 1,285 delivered to him, to Beale himself. Beale's own testimony was, however, taken by the United States, subsequently to the taking of such testimony by Hensley; and as he admits that Wozencraft's transaction with Hensly was correct, and the claim a just one, that proof on Hensley's part was rendered unnecessary.

None of the transactions condemned so strongly by Beale, in Doc. 57, could be confounded by persons familiar with the subject with Hensley's. But, as Wozencraft was connected with them, and with his also, it was thought best to rebut any unfavorable presumption against Hensley arising from that fact; and yet, from the severity of Beale's report upon Wozencraft, Hensley would not call upon Beale to testify; but the United States did call on him, and he confirms the testimony on the part of the claimant. The solicitor, indeed, considers his omission to speak of the delivery to him of the 428 head of cattle, in 1853, as a conflict in his testimony with that of claimant's witnesses on that point. This is certainly an untenable proposition. His silence, if it implies anything, is, on the contrary, evidence of his assent to the truth of the statement. But the true explanation of it is, no doubt, that his attention was not called to it as a matter in dispute. It is evident, indeed, that he thought the only question of fact about which there would be doubt, would be as to the delivery to Wozencraft.

As to the obligation of the government to compensate the claimant.

The act of 30th September, 1850, 9 Stat., p. 558, appropriated the sum of $25,000 "to enable the President to hold treaties with the various Indian tribes in the State of California," and the act of 27th February, 1851, appropriated $25,000 "addition to the appropriation of 30th September, 1850." The act of 28th September, 1850, authorized the President to appoint three Indian agents for the Indian tribes within the State of California.* Reddick McKee, O. M. Wozencraft, and G. W. Barbour were appointed, and on the 15th October, 1850, (see Senate Doc. 4, special session 1853, p. 8,†) were instructed to use "all *possible means*" to "make such treaties as may be just and proper." On the arrival of the agents (or commissioners, for they acted in both characters) in California, in December of that year, they found that strife existed between our citizens and the Indians throughout the land.—(See letters of Adam Johnston, Indian agent, and from the commissioners and Superintendent Beale, generally in Doc. 4, and particularly those on pp. 35, 36, 38, 52, 53, 54, 56, 65, 104, 133; also the depositions of General Denver in this case, then residing in California, and now Commissioner of Indian Affairs; and also the depositions in the Frémont case.) The commissioners, in their letter of the 17th of February, 1851, (p. 56,) from the San

* This bill was introduced by Senator Frémont, and was originally entitled an act to preserve peace among the Indian tribes in California by extinguishing their territorial clai m in the gold mine district.—(See Globe, vol. 21, 1793, 1828.)

† This document is hereinafter referred to as Doc. 4, and sometimes when a page is cited.

Joaquin, say what General Denver confirms, that a general border war was imminent. The war had been carried on by volunteers, each receiving $10 per day, (p. 56,) under the State authority, for about three months, and a war debt contracted amounting to about $2,000,000, (Doc. 4, 248,) of which the United States have reimbursed the amount of $924,259 65.—(10 Stat., p. 583.)

The cause of this strife was the encroachment of the whites upon the lands of the Indians, which had driven most of them to the mountains, where they were starved, from whence they returned from time to time for the purposes of plunder and revenge. Those who remained were reduced to servitude, (see Wozencraft's letter, July 15, 1851, p. 133,) and some of them were captured and brought from the mountains to be made slaves of.—(See Beale's Report, Doc. 57.)

The contest was marked by the massacres, murders, and plunderings which characterize the warfare of the races, in an aggravated form, and such was the exasperation existing that the old agent, Adam Johnston, who had been for some time in the region of the Fresno, towards which, as the most threatening point, the commissioners first directed their efforts, wrote to the department on the 7th March, before the arrival of the commissioners, saying that he doubted the possibility of obtaining peace, (page 65.)

War in such circumstances, it was manifest to every one, could not bring peace, except it was a war of extermination; and aside from all considerations of humanity, the mere cost of such a war would have been so enormous as to make it the duty of the commissioners to avoid it by all possible means. Soldiers could not be got in the regular army to carry it on. The ranks of the small number of regular companies in California were constantly reduced by desertion. The pay of volunteers was $10 per day, (p. 56;) transportation was proportionably expensive. Beale, in his letter of May 11, 1852, (p. 326,) refers to the estimates of the Quartermaster General to show authentically at what enormous rates only could the transportation for troops be obtained in California, and says that the cost of such a war could not be estimated. If the State expended so large a sum in the short time the war was carried on by it with a few small tribes, and the loss arising from the abandonment of the mines which it occasioned was, as Beale says, (p. 329,) equally great, what, he asks, would have been the pecuniary loss from a war with the entire Indian population of California? What the commissioners say, May 15, 1851, that it "is cheaper to feed the whole flock a year than to fight them a week," was therefore obviously true. Such was the expensive character of the war which the whole community felt to be impending when the commissioners arrived in California.

If this general war was to be avoided at all, it could only be by prompt and decisive action, and the necessity of such action was felt by the department in Washington. The instructions already quoted directed the commissioners to use "*all possible means* to conciliate the Indians." The scene of action was too distant to admit of special instructions, and therefore none were given. But it is manifest from the urgency of the language quoted, as well as from the whole tenor of the instructions, that the department was aware that a great emergency existed. The journals and proceedings of both houses of Con-

gress for that year show that petitions from the legislature and from the people of California for protection came with every mail. The existence of the war and the atrocities which marked it were also well known to the executive government, and the occasion was one which called for the appointment of such men as could be safely clothed with large powers, and left unfettered by special instructions in their exercise, and this was done.

It was at once seen by the commissioners, (page 56,) that to avert the danger something must be done "besides merely treating with the Indians." It was idle to persuade the poor wretches to be quiet while they were famishing. No amount of good reasoning or of fair promises could appease the hunger which impelled them to violence. This was obvious to every one, and the commissioners so informed the department. "The Indians must have food," they wrote. If they could be got to go through the ceremony of a treaty, it would be of no avail; they could not keep it and live, unless fed. No other expedient but that adopted by the commissioners was then or has since been thought of to meet the emergency. The solicitor, on the former hearing, questioned the necessity of recourse to the policy adopted by the commissioners, on the ground that the Indians might have supported themselves by labor in the mines. Some of them, he says, did labor in the mines, and their labor was valuable. Beale's report, as we have seen, corroborates the statement that some of the Indians did labor in the mines, and that their labor was deemed valuable, for it shows that they were kidnapped and sold as slaves for that purpose. But it also shows that this slave trade was marked by the usual atrocities incident to that traffic, and was a great cause, no doubt, of the exasperated feeling existing; and Beale urges the plan of putting the Indians in reserves, which had been adopted by the commissioners, and of which, in order to protect them from this and other wrongs, he became an earnest advocate. It is true that some of the Indians had been accustomed to labor at the missions established in California by the Catholic church; but the labor performed by them was agricultural, and chiefly as herdsmen, which they had been induced to perform under the mild sway of the missionaries. The labor to which the solicitor refers was very different, and the miners, for whom it was to be performed, were not the men to overcome the constitutional aversion of the Indian to the toil it demanded by religious influences, or by any other considerate persuasion. Under them it was compulsory labor, and the Indians' unconquerable repugnance to this is familiar to all. The fact, however, that some of the California Indians had learned from the missionaries some of the habits of civilization, was one upon which the commissioners based their hopes of success in the plan of founding reserves for them, where they might labor for their own benefit under the protection of public officers, and where, by furnishing them with improved utensils for farming, and educating them gradually in the use of such instruments, and other culture, they would rapidly advance in civilization, and soon be able to support themselves. The commissioners, therefore, in taking with them to the Indian country supplies of beef and bread, took the only means which could possibly stay the tempest which was gathering, and these supplies proved to be much better credentials than the President's

commission. The poor famishing creatures, who had been hunted out of their homes by the river sides, where they had caught fish and gathered acorns, into the sterile mountains, where such game as there was they were not skilled in taking, saw unmistakable evidence, in this offer of food, that the white man's heart was not utterly insensible to their sufferings. As soon as the news reached them they came joyfully to the feast, forgave all wrongs, and from that day to the present have kept their faith and been at peace with our people. The old agent, Adam Johnston, who, on the 7th of March, as we have seen, seemed to despair of any useful result from the commissioners, in June, (page 104,) writes the department in altogether a different strain. He had been busily engaged, in the mean time, spreading the news of the coming and overtures of the commissioners to the Indians, had got them out of the mountains to meet and treat with the commissioners, and writes "that great good has resulted."

The danger was at an end, the Indians were in fact pacified, and the whole country agreed that it was the timely supply of food that had effected this happy result; and this is what the present able and judicious Commissioner of Indian Affairs, General Denver, then living in California, and from his position an attentive observer of the events, now attests. And so his predecessor of that day regarded the action of the commissioners. On receiving the first treaty and accompanying letters of the commissioners referred to above, he is not content with saying that "the provisions of the treaty are approved of," but adds that "the department fully appreciates the difficulties with which you have had to contend in executing the important trust confided to you, and *is highly gratified* at the results you have thus far achieved."—(page 15.)

All the treaties made are said by the commissioners to be similar; pp. 128, 138. I have not been able to obtain a copy of any one of them, as the injunction of secrecy has not been removed by the Senate, but the journal of the commissioners, p. 95, states the substance of that made with the tribes on the Fresno. It gave the sixteen bands of Indians present a reservation between that river and the San Joaquin, "commencing at a point on the Chouchille river; thence a line running south along the foot-hills, crossing the Fresno river and San Joaquin river; continuing south along the top of the Table mountain, at whose base we are now encamped, crossing King's river to a point called the Lone mountain, near the first of the Four creeks; the western limit or line to be fifteen miles from the eastern; the Chouchille river, and the first of the Four creeks (or a line near it,) will be the northern and southern boundaries;" promised them "that they should be provided with 500 beeves, 260 sacks of flour, 3,000 pounds of iron, 500 or 600 pounds of steel, all kinds of seed, and clothing, in each of the years 1851 and 1852; that they should be provided with a farmer, blacksmith, carpenter, teachers, and stock for farming, which must not be killed, or the farming implements destroyed. Some of these things (said the commissioners) we will commence to give you now, (the food;) others must have the sanction of the President. These things are intended for all the tribes that will settle with you. Colonel A. Johnston will be with you occasionally to assist you, and settle any

difficulties that may arise." The consideration on the part of the Indians was their relinquishment of all claims to their lands. This treaty, with others, was submitted by the President to the Senate for their approval, but was rejected. The grounds on which the treaties were rejected were that the reserves included lands upon which our citizens had settled, and the number and great extent and supposed value of the lands reserved. See Remonstrances, pp. 277 to 283; Beale's letter May 11, 1852, p. 326, wherein he reviews and defends the whole policy of the treaties, and after showing that the beet and flour given the California Indians were but substitutes suited to their circumstances for the annuities in *powder*, *lead*, and *guns* given to other Indians, he endeavors to meet the objections as to the reserve on the Fresno, and others in the southern part of the State, by showing that it is impracticable to remove the Indians out of the State, either across the Sierra Nevada or into Oregon, and that the lands in question were very poor, and that " the persons who complain of these reservations in the south have in no instance been able to point out other locations less objectionable and valuable than those already selected."

But, that the treaties failed to receive the sanction of the Senate for these reasons alone, is shown conclusively by the fact that this body afterwards, and during the same session, as well as in every subsequent session, has concurred in laws to carry into effect the plans of the commissioners, when modified so as to obviate the objections to the number and size of the reserves, and to exclude from them the lands occupied by the whites. By the act of 30th August, 1852, (10 Stat., p. 56,) the sum of $100,000 is appropriated to be used " for the preservation of peace with those Indians who have been *dispossessed of their lands in California, until permanent arrangements* be made for their future settlement; *Provided*, that nothing herein contained shall be so construed as to imply an obligation on the part of the United States to support the Indians who have been dispossessed of their lands in California." The act of 3d March, 1853, (ib., p. 238,) provided for the *permanent arrangement* contemplated by the act of 1852, and "authorized the President to make *five* military reservations from the public domain in the State of California for Indian purposes, provided that such reservations shall not contain more than 25,000 acres in each; and provided further, that said reservation shall not be made upon any lands inhabited by citizens of California; and the sum of $250,000 is hereby appropriated to defray the expense of *subsisting* the Indians in California, and removing them to said reservations for protection." The act of 31st July, 1854, (ib., p. 332,) appropriated $200,000 "for defraying the expenses of continuing the removal and subsistence of Indians in California." The act also authorized the purchase of adverse titles to, " the reserved lands."

The act of 3d March, 1855, (ib. pp. 698, 699,) appropriated $54,000 for " the pay of the physicians, smiths, carpenters, and agricultural and mechanical laborers on the reservations in California; $125,000 "for the removal and *subsistence* of Indians" on said reservations; $150,000 for founding two additional reservations, "collecting, removing, and subsisting the Indians of California" thereon. The act of

18th August, 1856, (Annual Laws, p. 79,) contains appropriations for the same purposes, amounting to $200,000. The act of 3d March, 1857, (ib. p. 183,) contains an appropriation of about the same amount for the same purposes, and the act of 12th June, 1858, (ib. p. 330,) contains also such an appropriation, amounting to about $200,000.

These acts are severally entitled "An act making appropriations for the current and contingent expenses of the Indian department and for fulfilling treaty stipulations with various Indian tribes for the years ending June 30," (1851, 1852, 1853, 1854, 1855, 1856, 1857, and 1858, respectively.)

The proceedings of the commissioners "for *preserving peace* with the Indians who had been dispossessed of their lands," and for collecting them in reservations for the purpose of preventing them from marauding on the whites, and protecting them from the whites, have therefore been expressly sanctioned by law, and Congress has appropriated more than $1,300,000 for carrying their plan into effect.

The essential features of these laws and the treaties are the same. Both provide for collecting the Indians into settlements apart from the whites, and domesticating them and subsisting them temporarily; and it was to this common purpose of both the law and the treaties that the provisions obtained from Hensley were actually applied. And even if the *place* where this was done was material, it happens that the site at which the Indians were collected by the commissioners, at which Hensley's beef was fed to them, was in the vicinity of the present Fresno and King's River reservation; so that the beef was actually fed as subsistence to the Indians in collecting them at the present reservations, to all intents and purposes, and was applied by the proper officers of the government expressly to the purpose of *preserving peace with the Indians* who had been dispossessed of their lands in California, and in removing and subsisting them, and for no other object whatever. That Hensley's property had been, in a small part, applied to these objects before the appropriation to pay for it was made by Congress does not affect the legality of the transaction. That is a common case. There is no branch of the public service in which payments are not suspended for the want of appropriations, which are made as soon as the appropriation bill passes. The only question is, whether the appropriations, when made, were applicable to pay Hensley for the beef obtained from him and issued to the Indians to remove and subsist them, and this depends on the words of the law. As I have shown that these were sufficient, and that Beale, in whose hands this money was placed, and who was clothed by law (10 Stat., p. 3) with power "of exercising administrative examination over all claims and accounts, and vouchers for disbursements connected with Indian affairs in California," and who was specially directed to investigate these claims, (see letter of 7th April, 1852, p. 308,) decided, after examination made of this claim, that it was just, it will be asked why it was not paid? The answer is, *first*, that he preferred to apply the means in his hands to new engagements to be entered into by himself, and, in his opinion, they were not adequate for these new engagements, (see his report;) and, *cond*, as the supplies obtained from Hensley were furnished to the

Indians in pursuance of treaties which were rejected by the Senate, it was supposed the appropriations were not intended to apply to them.

This appears by the letter of the Commissioner of Indian Affairs to Beale, in reference to the appropriations, dated 4th September, 1852, page 36, in which he says "*the treaties having been rejected* by the Senate, it has been determined to apply $25,000 (of the appropriation) to the purchase of suitable presents," &c. The meaning of this, in view of the facts before us, is obviously that, as the treaties which stipulated for specific things which had been furnished to the Indians had been rejected, the department either felt constrained not to pay for the things with the means in their hands, or at least felt itself at liberty not to do so; showing plainly that it was assumed that there was some necessary connexion between the ratification of the treaties and the payment for the articles furnished the Indians, and this, too, when the department, as we have seen, itself approved the treaties and the furnishing of the provisions, only requiring that *in future treaties* the stipulations for furnishing the provisions should be "at a period sufficiently in the future to allow congressional action to meet the requisition;" letter of 25th June, 1851, page 17. And, indeed, it has been assumed throughout by the department, and even by some of the claimants, that there was some necessary connexion between the ratifications of these treaties and the payment for the purchases made, to carry into effect the plan of domesticating the Indians on reserves, which was, in the first instance, embodied in the form of treaties. But nothing could be more unfounded. Hensley was no party to the treaties, and their ratification or rejection could not affect him. His rights, as we have seen, depended on the appropriations which he and the commissioners and the department all expected would be made, and it could make no difference to him whether the treaties passed or not, if the law, in contemplation of *which* he surrendered his property to the public use, authorized payments to be made for the objects to which it was applied. I have shown that such appropriations, and ample in amount, were made. The fact that the purchases from Hensley were intended to fulfil the treaty, does not prevent the Court from considering them as applied under the law which was passed with the same objects. Indeed, the rule which requires the proceedings of public officers to be construed so as to make them legal when possible, would even authorize some straining of the language of the law for this purpose. But this is not necessary.

The appropriations were made expressly for the objects for which those provisions were applied. This is all that it is necessary for the claimant to show. But he might go further, and show that the government has in fact sanctioned everything actually done by these commissioners, except some of their paper transactions. Their treaties, and bills of exchange, have not been ratified; but the removal and subsistence of the Indians in reserves which they effected in part has been expressly authorized, and large sums appropriated to pay for the means used for those objects.

And effect has been given to their operations *by law* in other forms. For instance, the act of March 3, 1853, 10 Stat., 245, and other acts,

provide for the survey and sale of all public lands in California, and the report of the General Land Office of December, 1856, shows that 8,000,000 acres had been surveyed, and the surveys have progressed rapidly since; and whilst treaties have been made with the Indians in all other States and Territories for the surrender of their lands, none have been made with the Indians of California. This legislation, in the absence of any other treaties with the Indians for the possession of their lands, assumes that the Indian title has been extinguished in fact by the removal effected by the commissioners, and the Indians by their peaceful acquiescence in these measures, and in the continued encroachment of the whites on their lands, have undoubtedly acted on the assumption that their contracts with the commissioners were substantially subsisting engagements, which the government was carrying into effect from year to year. This also shows that the United States has substantially assumed by law the rights and obligations expressed by the treaties made by the commissioners, has taken possession of the Indian lands as rightfully belonging to it without making any other treaties, and has appropriated money for the subsistence and removal of the Indians to reserves, as stipulated for by the commissioners, as the consideration for their lands.

Nor is there anything in the laws which, whilst assuming the right to the lands which the commissioners had acquired, and providing substantially for the payments for which the commissioners had stipulated, could be construed to disavow the payments actually made by the commissioners. On the contrary, the appropriations are made for the identical objects with those to which two-thirds of Hensley's property was applied by Wozencraft, and to which one-third of it was applied by Beale, nearly all of it being fed after the appropriation of 1852 passed. No government or individual, in such circumstances, would be permitted by a judicial tribunal to escape responsibility. But here there is no ground for imputing to the government an attempt to evade payment for property actually used in its service. It has not only accepted and approved the results obtained by the commissioners, but it has appropriated money which should have been applied by the executive officers to pay for the indispensable means used by the commissioners and superintendent of Indian affairs in obtaining those results which were procured to so great an extent from the claimant in this case. It will not be questioned that Hensley is entitled to compensation for the cattle actually received by Beale. He himself construed the law as applicable to these, for he received them, and must be supposed to have applied them properly. But what conceivable reason is there for discriminating against Hensley as to those which were actually applied to the same purpose by Beale's predecessor in office? The object of the law was, in fact, much more effectuated by those applied by his predecessor than by Beale, for it was by that application that the peace, for which the appropriation was expressly made, was obtained.

But if it could be doubted that Congress, in adopting the results obtained by the commissioners, and their plan generally, and appropriating money to carry it into effect, intended to pay for the means

which were at that time being applied to the objects of the law, that doubt would be removed by considering the act of March, 1852.

Beale, the superintendent, by that act, (10 Stat., p. 3,) had "the power of exercising administrative examination over all claims and accounts and vouchers for disbursements connected with Indian affairs in the State of California which shall be transmitted to the Commissioner of Indian Affairs for final adjudication, and by him passed to the proper accounting officers for settlements;" a jurisdiction which he and the department construed to extend to this claim. (See his letter, Doc. 4, p. 308.) It wa to enable the department to comply with the request contained in that letter, to excuse him from so much of the investigation required of him as related to the claim of Frémont, in consequence of his relations with Frémont, that the Committee on Indian Affairs reported the amendment to the Indian appropriation bill, on the 6th August, 1852, to be found in the Senate Journal, p. 575, in these words: "To enable the President of the United States to cause an investigation to be made into certain claims preferred against the United States, for provisions alleged to have been furnished to the Indians of California, ten thousand dollars." The Senate did not concur in this amendment; Mr. Atchison, among others who voted against it, objecting to it on the ground "that we have a superintendent of Indian affairs. An office of this kind has lately been created, *and a competent man* has been *appointed to fill it—one who is well qualified to investigate these claims.*"—(Globe, vol. 24, p. 2104.) Mr. Bell said, ib., p. 2106: "I have heard it suggested that the law under the authority of which the superintendent of Indian affairs for California was appointed, clothes him with the power to examine these claims, and that there is some necessity for making a provision of this kind upon this occasion, in order to get an examining agent free from all suspicions of prepossession or prejudice. If that is so, it might be a reason why we should make the appropriation." Mr. Weller said: "I understand that the executive branch of this government have decided that it has no discretion under the law, but that it is *the imperative duty of the superintendent of Indian affairs to make the whole of this investigation*, and that unless the legislative department of the government shall relieve him, he will be compelled to make that investigation. I understand that *the Executive* has decided that, under the law, he has no discretion." Mr. Bell said: "I desire now to say a word in regard to the superintendent, because, when the proposition was made to establish a superintendency in California with *such large powers*, I was very determined to oppose the passage of such an act, on the ground that I knew, unless the superintendent was a man of extraordinary firmness and integrity of character, he would have it in his power to involve the government in millions annually, from which it would be difficult to extricate ourselves without paying the claims. I have inquired with regard to the character of the gentleman who has been appointed superintendent, and according to all the information that I can get from frequent conversations with him—from the experience he has had among the Indians in that country, from his intrepidity and firmness in all his past character—I thought him a very fit and proper man

to be appointed. If any reliance can be placed in human testimony with regard to the character of an individual—any reliance on the personal intercourse which we can have with other persons—he was a suitable man," &c.

As the legislature refused to relieve Beale from the investigations which the President considered it his imperative duty to make, under the law as it then stood, Beale proceeded to make the investigation, and the evidence in this case shows that his examination resulted in the opinion that Hensley's claim against the United States was a just one. And the concurrence of the friends and opponents of the administration in Beale's eminent fitness for the high trust evinced by the tributes to him above quoted from Senators Atchison and Bell, a circumstance so unusual in our times, adds moral weight to the legal effect of his judgment. The claim was not paid, and the vouchers transmitted to the Commissioner and the accounting officers, with the accounts of the superintendent, in consequence, as we have seen, of the rejection of the treaties, which the department construed as excluding it from the benefit of the appropriations—a proposition which I have already considered and contended against. But the case here does not depend on the correctness of that construction. The Commissioner's decision amounted to no more than to exclude the claims to be investigated by Beale from the benefit of the existing appropriations. Whether those whom Beale should find to hold just claims were entitled to have appropriations made for them, which is the question here, was not passed upon in that decision. That depends upon the question, whether Beale had power to take cognizance of the claims, and what effect is to be given to his action upon them. That it was intended by the law that he should investigate these claims, is certain. If the terms of the law itself were less explicit, the unquestioned construction which we have seen was given to it in the Senate, where it had just been enacted, and by the Executive, to the effect that the law, as it stood, made it the imperative duty of the superintendent to investigate these claims, would leave no room to doubt that it was a special object of the law, which conferred such large powers upon him, to require him to examine and pass upon these claims. For what end was this imperative duty imposed, unless a demand was to be paid, on which the superintendent made a favorable decision? I have already attempted to show what I believe to be the only logical conclusion, that in such case the existing appropriations were equally applicable to its payment as to the payment of any other recognized claim, because no legislative action was contemplated by the law, upon the decision of the superintendent with respect to such a claim, more than upon any other, and because such payments were equally within the objects of the law. They were excluded, however, ostensibly because the treaties failed; but in reality, I have no doubt, because of the inadequacy of the appropriations for the exigencies of the year. But whether properly or improperly excluded, it stands as a claim recognized as just by an officer instructed by the President to investigate it in pursuance of law, and nothing is required to complete the obligation of the government to pay such a claim.

It is also claimed that the President had power, under the uniform

usages of the government, which the Supreme Court have decided is as authoritative as the statute law itself, to take such measures as he deemed advisable to maintain peace with the Indian tribes in California. It does not require a statute of the United States to authorize the President to march the army into the Indian territory to put down Indian disturbances. Practically, his authority in our Indian relations is almost unlimited. He orders the army to make war upon them as he thinks the occasion requires. At this moment he is carrying on war with the Navajoes in Mexico, in which he captures them and causes them to be put to death without any authority from Congress, and it is but a few years since General Harney destroyed great numbers of the Sioux by the order of the President. If the President has this unlimited authority to kill and capture the Indians in order to preserve the peace among the tribes and towards the people of the United States, how can it be denied that his authority extends to collecting such of the Indians as are marauding and murdering the whites, and are being plundered and murdered in turn by the whites, into places where this process can be stopped, and can use the needful means for that purpose? It would seem to follow that if the Executive has exercised power from the beginning of the government of capturing and slaying the Indians whenever it seemed to him requisite for the public peace, that he had authority to collect them in places where they could be restrained from acts of rapine and violence. This is what was done by his authority and with his express approval in California, and the claim here presented is for the means furnished him to do this.

Reply to the objections of the Solicitor.

The Solicitor, on the rehearing, without controverting the fact that the supplies furnished by Hensley were applied to the objects for which the appropriations were made, or that it was customary to apply appropriations to pay for purchases made in advance of them, insisted that that was not done in such cases as this, where the purchase was made before the appropriation of 1852, which he said was the first, and that the practice referred to existed only where the annual appropriation was anticipated for objects for which there had been previous appropriations, as for the work or materials on the public buildings.

To this I replied that the appropriation of 1852 was not the first of the series of appropriations made for the objects in question, and that those of 1850 and 1851, cited above, were both for the same objects, and were applied to those objects; and that the case, therefore, differed in no respect from the ordinary one, where a disbursing officer exceeded his authority in receiving supplies beyond the amount of existing appropriations, which, although undoubtedly an irregularity, was always regarded as cured by the appropriation when made. There is no branch of the public service in which this is not of constant occurrence. And the act of March, 1852, constituting the superintendency, which, both by its terms and by its contemporaneous construction, required the superintendent to examine these claims, was

but a restriction against the payment of them, in accordance with this usage, unless they were found to be just by the superintendent.

The Solicitor also denied that Beale had made any report upon the claim which could be regarded as an adjudication of it. I did not say that he had made any *formal* report of this character. This was unnecessary. If the Court was satisfied that he had, in fact, examined the subject at the time he was superintendent, and come to the conclusion that it was a just claim, this was all that was necessary. The non-compliance with the form I explain above. It was no fault of the claimant. He might have made a report in form, and it might have been lost or destroyed. On proof of that fact it would not be denied, I presume, that Hensley was entitled to the benefit of the judgment in his favor. This would not be denied if the judgment had been that of a court of record. But here, when the law did not require any formal proceedings on the part of the officer in making up his judgment, or any formal record of it, no objection can be made to giving effect to the judgment actually arrived at by the officer, if that can be satisfactorily proved. The only material thing is, that it be shown that the officer did, in fact, make an examination, and arrive at the conclusion that the claim was just. This he swears he did, in a deposition taken by the government in this case. We have also an official report, made at the time, which is a summary of his investigations, intended to characterize generally the financial transactions of these commissioners, which shows that he had scrutinized them closely, and that whilst he was severe upon them as to other transactions, he casts no censure upon them for this, respecting which he testifies now explicitly that his judgment *then* was, that it was correct.

M. BLAIR,
For Claimant.

IN THE COURT OF CLAIMS.—No. 159.

SAM'L L. HENSLEY *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz:

Doc. 1, Senate, 2d Sess. 31st Congress, Annual Rep. Sec. Int.

Doc. 61, Senate, 1st Sess. 32d Congress, Debts Contracted by Indian Agents, &c.

Doc. 4, Senate, Sp. Sess. 1853, Correspondence with Indian Agents.

Which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, n California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian department.—(Com. Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians

"in the valley of San Joaquin."—(Com. Ind. Aff. to Johnston, Nov. 24, 1849, Doc. 4, p. 5; also pp. 4, 6.) It does not, however, appear to have been the *object* of this restriction to limit this sub-agency on the south, but only to divide it from a new one created on the north, for Sacramento valley.

It seems this appointment was made under the 5th section of the act organizing the Department of Indian Affairs, approved June 30, 1834.—(4 Stat., 735.)

By act of September 28, 1850, (9 Stat , 519,) the President was authorized to appoint three Indian agents for California, and by an act approved September 30, 1850, (9 Stat., 558,) an appropriation of $25,000 was made, "to enable the President to hold treaties with the various Indian tribes in the State of California."

George W. Barbour, Redick McKee, and O. M. Wozencraft, were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended; and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of $25,000 was then remitted them.

By an act approved February 27, 1851, sec. 3, (9 Stat., 586,) it was enacted that "hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose." The provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated (under the act of 1851) to negotiate with the Indians of California under the instructions already given.

This letter was received by the commissioners in San Francisco early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat., 572,) a further appropriation of $25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners that the two appropriations of $25,000 each constituted all the money applicable to the negotiation of treaties in California; and he said, "when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress." This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour, at San Francisco, in September, (p. 260,) and Wozencraft, on the Sacramento river, September 2, (p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at camp Barbour, May 1, (Doc. 4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs, by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

From Camp Barbour Wozencraft returned to San Francisco May 13, and on the 24th left again to visit and treat with the Indians in the northern part of his district. From this he returned to San Francisco on or before the 30th of September, (Doc. 4, p. 187.) Besides what cash he had expended, he had incurred debts for provisions furnished to Indians up to September 16, to the amount of $60,060, (Doc. 4, p. 189.)

This sum alone exceeded the whole appropriation, and he had previously, as above shown, received the letter of the Commissioner of Indian Affairs of June 27, 1851, directing him in that event to cease negotiation. From this date forward, therefore, September 16, 1851, he had no authority except as "agent simply."

The claim of Hensley arose long after this date.

Hensley made a contract with O. M. Wozencraft February 10, 1852, for 1,900 head of cattle, to be delivered between the Mokelumne river and the Four Rivers, when required, at the rate of 15 cents per pound, payable at the time or times of delivery by drafts on the Secretary of the Interior. On the next day, February 11, he stated an account charging for 1,900 head of cattle, at 500 pounds each, delivered to Indians in the San Joaquin and Tulare valleys, which Wozencraft certified to be correct, (Doc. 4, p. 363,) amounting to $142,500, and drew drafts upon the Secretary of the Interior to the amount of $137,500. In the petition it is stated that the quantity of beef was 83,333⅓ pounds. These drafts were presented at the department in March, 1852, not accepted, and notice was given to Hensley and Wozencraft by protest. This protest must in course of mail have reached them in April, and no part of the beef was delivered to the persons who were to deliver it to the Indians till the 4th of May following. (See Vinsenhaler's and other depositions for petitioner.)

Thus the parties had ample notice that the government repudiated the contract before any delivery took place under it.

The testimony goes to show that the beef was delivered to Savage, the Indian trader, contrary to the policy of the 14th section of the act establishing the Indian department, approved June 30, 1834. (See 4 Stat., 738.)

Savage was a trader, licensed to trade on several reservations where the Indians numbered rather more than 2,600.—(See Johnston's account and map of the reservations, Doc. 4, p. 241.)

The Indians on these reservations were mining for and trading with

Savage.—(Commissioner McKee's letter, July 29, 1851, Doc. 4, p. 128.) This trade was valuable; the traders were willing to pay large sums for licenses, and they realized great profits.—(Sub-Agent Johnston's reports of June 24, 1851, Doc. 4, p. 107, and December 4, 1851, *Id.* p. 246.) (See also Superintendent Beale's estimate of the value of Indian labor, *Id.* p. 374.)

Thus the representations of the great distress of Indians, (see Superintendent's Beale's letter, Doc. 4, p. 378,) and other similar reports, all entitled to credit, do not apply to the Indians on the reservations, but to the remainder of the 30,000 Indians in San Joaquin valley.

These Indians, therefore—those settled and working on the reservations—could have been in no need of such aid. And, moreover, ample provision had been made for occasional cases of want by the three commissioners, who, in August, 1851, had purchased and delivered to Sub-Agent Johnston, for the Indians south of the Chonchilla, 1,900 head of cattle, (Doc. 4, p. 268,) which was sufficient to last till May, 1852, (Doc. 4, p. 259.)

As to the part of the beef that was delivered, the exhibit in the deposition of Beale shows how recklessly it was wasted in feasts at Savage's ranch and elsewhere, instead of being carefully dealt out according to the wants of the Indians.

But all of it was not delivered. When Wozencraft was dismissed from office, in the autumn of 1852, he gave Superintendent Beale an order on Hensley, November 30, 1852, (Doc. 4, p. 389,) for 612 head of these cattle, still in the possession of the contractor, more than nine months after these drafts had been given in payment for them. There is some evidence to show that Beale subsequently received part of these, but not in his official capacity. Beale in his deposition does not admit that he received them, nor is it known what has ever been done with them.

On the part of the United States the Solicitor maintains that the commissioners had no authority to make contracts beyond what was expressly or impliedly given in their written instructions:

That if they had any such authority as commissioners, it was taken away by the act of February 27, 1851:

Or, if not by that act, then by the instructions of April 12, 1851, even if given under an erroneous construction of the act.—(U. S. *vs.* Eliason, 16 Pet., 291:)

And that all authority to negotiate treaties ceased under instructions of June 27, 1851, on or before the 30th of September, 1851.

It is further contended, that the contract with Hensley is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfilment:

And again, being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for Indians:

And again, if these acts should not be held to apply, objection is further made for non-conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien August 29, 1829.

It is contended that no authority was given to the commissioners to do more than was necessary to conclude treaties; that this authority did not extend beyond the conclusion of the treaties—*i. e.*, the commissioners could not, under the authority to conclude the treaties, agree with the Indians, as an inducement to accept terms, that the treaties themselves should be fulfilled before being ratified by the Senate, or even being forwarded to the President.—(See letters of Commissioner of Indian Affairs to them, June 25, 1851, and July 16, 1851, Doc. 4, pp. 17, 18.)

It is claimed by the petitioners that the relation of the government to the Indians is similar to that of guardian to his ward, and it is therefore bound for necessaries furnished. If so, those who claim to have furnished necessaries must prove the necessity, (Chitty Cont. 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The Solicitor denies that Wozencraft had authority to purchase the cattle from Hensley.

He denies that the Indians for whom it was purchased needed the beef for their subsistence.

He denies that all the beef was delivered according to contract.

He denies that any of it ever came into the possession of any officer or agent of the United States.

And he maintains that the claimant, before he parted with his property, had ample notice that the government would not pay for it.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

SAMUEL J. HENSLEY *vs.* THE UNITED STATES.

LORING, Justice, delivered the opinion of the Court.

This is one of a class of cases pending before this Court, and arising under contracts made by commissioners and Indian agents of the United States in the State of California. The action of these commissioners and agents, in making the contracts, and the validity of the claims founded on them, have been in the argument of all of them rested in great measure upon the condition of the Indian country at the time the contracts were made, and thus that local history is a part of the evidence in this class of cases.

By act of Congress, September 28, 1850, (9 Stat. at L., 519,) the President was authorized to appoint three Indian agents for California.

And by act September 30, 1850, (9 Stat. at L., 558,) an appropriation of $25,000 was made, "to enable the President *to hold treaties* with the various Indian tribes in the State of California."

Under the former act, Redick McKee, George W. Barbour, and O. M. Wozencraft, were constituted severally Indian agents in California, on October 10, 1850, (S. Doc. 4, p. 7,) but on the 15th of the same month their functions as Indian agents were suspended, and they were appointed "commissioners to hold treaties with various Indian tribes in the State of California, as provided in the act of Congress approved September 30, 1850."—(S. Doc. 4, p. 8.)

By act of Congress, February 27, 1851, (s. 3, 9 Stat. at L., 586,) it was enacted that "hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose." Under this act the functions of Messrs. McKee, Barbour, and Wozencraft, as Indian agents in California, were revived; and as such they were "designated to negotiate with the Indians in California," under the instructions theretofore given them as commissioners.—(S. Doc. 4, p. 14.)

By letter dated October 15, 1850, (S. Doc. 4, pp. 8, 9,) the commissioners had been instructed as follows: "As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California, they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and after obtaining whatever light may be within its reach, will determine upon some rule of action which will be most efficient in obtaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body, or separately, in different parts of the Indian country."

It is observable that these instructions are very general, that they specify nothing but the objects of the government, and that emphatically repeating that object to be "to conciliate the good feelings" of the Indians, and to confirm those good feelings by permanent treaties, they leave it to the commissioners "to determine upon some rule of action which will be most efficient in attaining the desired object."

The reasons of the generality of these instructions, and the extent of the discretion vested in the commissioners, are illustrated by the preceding paragraph in the same letter: "The department is in possession of little or no information respecting the Indians in California, except what is contained in enclosed copies of papers, a list of which is appended to these instructions; but whether even these contain sufficient data to entitle them to full confidence will be for you to judge, and they are given to you merely as points of reference."

The generality of the instructions is pressed upon the attention of the department, in a letter dated Decem er 6, 1850, (S. Doc. 4, 52,) in which Commissioner McKee states that the commissioners regret that their instructions from the government "are so meagre and

indefinite, and throw upon them necessarily so much responsibility. In the absence of direct and positive instructions, or even counsel and advice, we must do the best we can, relying upon your approval of what we may do, based upon an honest desire to promote at once the best good of the Indians, while we maintain the honor and evince the benevolent designs of our government towards the unfortunate aborigines."

Thus empowered and instructed the commissioners entered upon their duties by convening and organizing at San Francisco, January 13, 1851, and after obtaining information from the governor of California, and from the members of its legislature, then in session at San José, they proceeded to the Indian country in California, and the condition of that country at this time makes a material fact in this class of cases. The discovery of gold had filled it with miners, whose sudden and extensive emigration had brought into collision the interests of the whites and the rights of the Indians. Difficulties of a serious character had arisen between them, and, beginning in the northern part of the State, as early as July 6, 1850, (S. Doc. 4, pp. 38, 52,) had extended to its southern border, (S. Doc. 61, pp. 2, 3.) Mr. Adam Johnston, in his official report as sub-agent, dated September 16, 1850, (S. Doc. 4, p. 44,) says of the Indians: "They have an indefinite idea of their right to the soil, and they complain that the *pale faces* are overrunning their country and destroying their means of subsistence. The emigrations are trampling down and feeding their grass, and the miners are destroying their fish dams. For this they claim some remuneration, not in money—for they know nothing of its value—but in the shape of clothing and food."

And in December 6, 1850, (S. Doc. 4, p. 52,) Commissioner McKee, quoting an informant, says: "He informs me that the Indians on the waters of the Sacramento are in a very dissatisfied and unsettled state. Just before he left there was an outbreak, in which blood had been shed on both sides; and the next news from that quarter will probably announce increased disturbances, if not a general war between the whites and Indians." And in the same letter he thus continues: "They were mustering volunteers at Sacramento city and at other points when my informant left, and bloody work was anticipated. What is to be the result of this state of things I cannot even conjecture. The Indians claim the country as their native soil, or hunting and fishing ground, and the whites want to explore it for gold, and, if they find the metal there, will insist on retaining its possession." And in his letter of February 11, 1851, (S. Doc. 4, pp, 54, 55,) he says of the southern district: "So many direct injuries have been inflicted on these Indians by the whites, and so many promises made them of restitution and redress, all of which remain unfulfilled, that they have lost all confidence, and are now, we are told, fighting with desperation for their lives and their country. The whites have driven most of the southern tribes up into the mountains, from whence, as opportunities serve, they sally out into the valleys to steal and drive off the cattle and mules as the only alternative for starvation. Then comes up the cry of Indian depredations, invasion, murders, and the absolute necessity for exterminating the whole race." And generally the details of

the evidence submitted to the Court (S. Doc. 4, pp. 58, 60, 61, 62, 64, 65, 66, 71, 72, 81, 82, 83, 85, 89, 109, 113, 115) confirm the information given to the commissioners, and of which the summary is reported to by them, (S. Doc. 4, p. 56,) that hostilities of a deadly character existed between the Indians and whites in different portions of the State, threatening, indeed, *a general border war*.

And the state of the Indian country when the commissioners began their labor in it is clearly shown by the fact that the troops of California were in the field engaged in actual hostilities with Indian tribes, (S. Doc. 4, p. 71,) and by the instruction to the commissioners May 9, 1851, (S. Doc. 4, p. 15,) in which the Commissioner of Indian Affairs says: "I have been informed that it is deemed necessary by the War Department to commence active military operations against the Indians in California, and in that event it will be highly important that one or more of the agents shall accompany each detachment of the troops sent against them, so as to be in readiness to act in the capacity of negotiators should occasion require. What particular negotiations may be required it is impossible for this office to foresee; nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately entrusted."

In this state of things the commissioners adopted the measure of bringing the Indians from their homes in the mountains and mining regions and placing them on reservations made for them by the commissioners from the unoccupied lands in the plains, and they proceeded to enter into treaties with the Indians, in which their removal into the reservations was made an indispensable condition, and their subsistence there was provided for for the years 1851 and 1852. In the report of the commissioners, dated March 25, 1851, (S. Doc. 4, pp. 69, 70,) in detailing their proceedings in the formation of the first treaty which they made, they say: "After submitting our propositions to them we desired them to retire and consult among themselves upon the terms that we had proposed, and in an hour we would again meet them and learn their decision, as well as hear propositions from them, if they desired to make any. When we again met them they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and *that we could treat with them upon no other condition*, believing that, if they were to remain in the mountains, constant conflicts between the Indians and miners would take place; that the Indians could not, nor would they attempt to, support themselves otherwise than by stealing horses, mules, and cattle from the farmers in the plains, and by depredating upon small parties of miners in the mountains. After we had explained these matters fully to them they again consulted together, and finally agreed to remove their families to the plains, as we desired."

And the proceedings and purposes of the commissioners are succinctly stated by Commissioner Barbour, (S. Doc. 61, p. 2,) when, after describing the strife between the Indians and the whites, he says: "Under such circumstances the commissioners undertook to effect a reconciliation and carry out the plan agreed upon for treating with the Indians.

Treaties were, with much trouble and delay, made by the joint board of commissioners with several tribes, with the terms of which you were in due time made acquainted. A very important feature in these treaties, and one, too, without which no treaty could have been made with the Indians, was the supply of an agreed amount of beef and flour to aid in the subsistence of the Indians treated with during the years 1851, 1852. Without some such provision the commissioners, as well as every intelligent man in California, knew that no treaty made with these Indians would be observed by them. Necessity as well as inclination would compel them to steal from the whites animals on which to subsist, as, in a large majority of cases, the stores of acorns laid up by them had been destroyed by the whites. The commissioners, therefore, urged by the calls of humanity and the voice of the whole country, could do nothing less than agree to furnish the provisions stipulated in the different treaties."

And the policy of the commissioners is stated by Commissioner Wozencraft, May 14, 1851, (S. Doc. 4, pp. 82, 83:) "You have been advised of the policy which we have deemed expedient to adopt; permit me to say a few words in relation to it. The common and favorite place of abode of the Indians in this country was in the valleys and within the range of mountains; the greater portion were located and had resided, as long as their recollections and traditions went, on the grounds *now being turned up for gold*, and now occupied by the gold hunters, by whom they have been displaced and driven higher up in the range of mountains, leaving their fisheries and acorn grounds behind.

"They have been patient in endurance, until necessity taught them her lesson, which they were not slow to learn, (as it is measurably intuition with the Indian,) and thus they adopt from necessity what was deemed a virtue among the Spartans; and the result is, we have had *an incipient border war*—many lives have been lost, an incalculable amount of property stolen, and the development and settlement of the country much retarded; and this will ever remain unavoidable so long as they are compelled or permitted to remain in the mountains. They can come down in small marauding parties by night and sweep off the stock of the miners and farmers, and before the loss is known they will be beyond pursuit; and I venture the assertion that this would be the case, in defiance of all the troops that could be kept here.

"Our policy is, as you have been informed, to get them down from their mountain fastnesses and place them in reservations along in the foot-hills bordering on the plains; the miners will then be between them and the mountains, making a formidable cordon, or barrier, through which it would be difficult to take their families unobserved; and in those reservations there will be no place for concealing stolen stock, and they can there have all the protection which can and should be afforded them against their persecutors; and lastly, they will there learn the ways of civilization, and thereby become useful members in the community instead of being——"

In pursuance of this policy the commissioners acted jointly until May 1, 1851, (S. Doc. 4, 74,) and thereafter severally, in forming the treaties under which the claim I read before the Court has arisen.

All the treaties made by the commissioners, jointly or severally, contained the stipulations that the Indians should remove from their mountains into the reservations on the plains, (S. Doc. 4, pp. 128, 138,) and should there receive specified amounts of provision for each of the years 1851, 1852; and, as we have seen, this was the policy adopted by the commissioners, and by them reported to the department in the beginning of their proceedings.—(S. Doc. 4, pp. 128, 138.)

On May 22, 1851, the Commissioner of Indian Affairs addresses the commissioners, officially, thus:

"GENTLEMEN: Your letters of March 5 and 25, 1851—the last enclosing a copy of a treaty entered into with the chief captains and headmen of six tribes of Indians in California, and one from Agent McKee, of March 24, 1851—have been received.

"The department fully appreciates the difficulties with which you had to contend in executing the important trust confided to you, and is highly gratified with the results thus far achieved, especially with your energy and despatch in procuring a location for several tribes of Indians, and promptly removing them to it.

"The provisions of the treaty, a copy of which is acknowledged above, are approved of."

Under the treaties the Indians were removed on to the reservations.—(S. Doc. 4, pp. 70, 252.) The land of these reservations was poor in quality, uncultivated, and stinted in natural productions, and it was a necessary consequence of such removal of the Indians that they should be supplied with food. Mr. Wozencraft says, (S. Doc. 4, p. 83:) "The country set apart for them is very poor soil; only a small part of it is adapted to agricultural purposes." Mr. Johnston says, (S. Doc. 4, p. 105:) "On the breaking out of the war in December last the Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites, in pursuing them, burned and destroyed all that fell in their way; consequently, at the time the different treaties were entered into the Indians of this region were destitute of anything to subsist upon, even if left to range at liberty over their native hills. Under each treaty they were required to come from the mountains to their reservations on the plains at the base of the foot-hills. They were but children of nature, ignorant of the arts of agriculture, and incapable of producing anything, if they had been placed on the best soil of the earth. They came from the mountains without food, depending on the small amount allowed in their treaties, with the roots and seeds, to be daily gathered by their females; these have been found wholly inadequate to their necessities." Again, Mr. Johnston says, (S. Doc. 4, p. 244:) "In none of these reservations is there any agricultural land, except in spots; a few acres only can be found together, and those upon the banks of the streams." And Superintendent Beale says, (Doc. 4, p. 325:) "With reference to the character or quality of the land reserved by the treaties for the Indians, I can only speak from personal observation with regard to those selected in the southern portion of the State. They are such as only a half-starved and defenceless people would have consented to receive,

and, as a general thing, they embrace only such lands as are unfit for mining or agricultural purposes." And Commissioner McKee (S. Doc. 4, p. 249,) says: "In my judgment there are not more than two or three out of the whole number of reservations which any practical man or company would purchase, *as a whole*, at even one cent per acre, subject to State and county taxes. Still, we had endeavored to include in every such selection some good lands capable of subsisting the Indians; and it would have been a wretched policy, as well as gross injustice, to have done otherwise. Our object had been to give them lands which they could work, and upon the product subsist, after two or three years, during which the government would aid them by supplies of food, clothing," &c.

The effect of the removal of the Indians on to the reservations was to put an end to the strife in the Indian country, which threatened a general Indian war, and to secure to the miners the peaceable possession of extensive and valuable mining districts. Mr. Johnston says of the Indians, Dec. 3, 1851, (S. Doc. 61, p. 12:) "Those with whom treaties have been entered into, residing in any agency upon the San Joaquin, Fresno, Mercedes, and Tuolumne and Stanislaus rivers, have been seemingly quiet and contented since I have been supplying them with food." And Commissioner Barbour says of the same Indians: "They occupied the country about the headwaters of the Tuolumne, Mercedes, and Mariposa rivers, embracing some of the richest gold mines of the State, from the most of which they had driven the miners, killing many of them, and having driven off and destroyed a large number of horses, mules, and beef cattle. By the terms of the treaty they surrendered all claims to this extensive rich mineral region, and accepted a tract of country allotted to them between the Tuolumne and Mercedes rivers, to which they removed shortly after the treaty, and where they were living quietly and contentedly, and doing well when I last saw them in the month of September, 1851." And of the Indians treated with April 29, 1851, he says, (S. Doc. 4, p. 252: "The Indians treated with on this occasion inhabited the country on the Mariposa, Chouchilla, Fresno, Upper San Joaquin, and King's rivers, embracing a very large extent of the very richest gold region in the State, from which they had driven the miners, after killing many of them, and destroying their property. They, by this treaty, surrendered their title to hundreds of miles of country rich in gold, and accepted a district of country specified in the treaty sufficient for their purposes, and well adapted to their wants. Shortly after the treaty they all removed to and settled in the district of country allotted to them, and were working industriously, doing well, and living contentedly in their new home when I left them in September last," (1851.) Mr. Wozencraft says, December 1, 1851, (S. Doc. 4, p. 229:) "The Indians throughout my district are quiet and peaceable." And again, May 29, 1852: "The Indians throughout my district are quiet and peaceable, except some few thefts;" and (S. Doc. 61, p. 24) gives Dr. Rejois' statement: "The Indians in good faith have come from the mountains, given up their mines and hunting grounds to the miners, and are desirous of learning from the white man the customs of civilized life."

By Senate Document 4, pp. 268, 326, it appears that the treaties made by the commissioners were submitted by the Commissioner of Indian Affairs to Lieutenant Edward F. Beale, with directions to report "his views as to the merits" of the treaties. In his report he says: "With reference to my views as to the merits of the treaties, I state that I regard the general line of policy pursued by the commissioners and agents in negotiating with the Indians as proper and expedient under the circumstances. My own personal knowledge and experience in Indian affairs, and particularly in reference to the tribes within the State of California, incline me to the opinion that to secure their peace and friendship no other course of policy, however studied and labored it may have been, could have so readily and effectually secured the object in view."

But it is observable that this commendation applies only to the general line of policy adopted by the commissioners, viz: the removal of the Indians to reservations, and their temporary supply there with subsistence; and it is not to be extended to the terms of any particular contract for supplies or the circumstances of its execution.—(S. Doc. 57, p. 2; S. Doc. 4, p. 366.)

Congress appropriated by act September 30, 1850, (Stat. at L., 9 vol., p. 558, c. 91,) to enable the President to hold treaties with the various Indian tribes in the State of California, twenty-five thousand dollars. And by the act of February 27, 1851, (Stat. at L , 9 vol., p. 572, c. 12,) "For expense of holding treaties with the various tribes of Indians in California, in addition to the appropriation of the thirtieth of September, eighteen hundred and fifty, twenty-five thousand dollars."

The amount of these appropriations (fifty thousand dollars) was by the acts themselves applicable to *the holding* of treaties, and to no other purpose. It had no reference to expenditures incurred in the fulfilment of treaty stipulations, and was not therefore applicable to the contracts claimed upon; and the commissioners were instructed by the department in its despatch of June 25, 1851, (S. Doc. 4, p 17,) which informed them of the remittance of the appropriation last made, that articles deliverable under the treaties must be provided for by future appropriations.

By instructions from the department, dated June 27, 1851, (S. Doc. 4, pp. 17, 18,) the commissioners were informed that the amount of the appropriation stated above ($50,000) was all that was applicable to *the negotiation* of treaties in California, and were instructed, "when the funds referred to have been exhausted you will close *negotiations*, and proceed with the discharge of your duties as agents simply, as the department could not feel justified in authorizing anticipated expenditures beyond the amount of appropriations made by Congress."

These instructions prohibited the commissioners from negotiating or entering into treaties after the appropriations were exhausted, but they had no reference whatever to the action of the commissioners under treaties made before the appropriations were exhausted.

All the treaties made by the commissioners were rejected by the Senate.

The statute of August 30, 1852, (10 Stat. at L., p. 56,) appropriated: "For the preservation of peace with those Indians who have

been dispossessed of their lands in California until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars. *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their lands in California."

And by the act of March 3, 1853, the President was authorized to make five military reservations from the public domain in the State of California, and the sum of two hundred and fifty thousand dollars was appropriated to defray the expense of subsisting Indians in California, and removing them *to said reservations* for protection.

And the annual appropriation acts of 1854–'5–'6–'7–'8, contained similar provisions for concluding the removal and continuing the subsistence of the Indians.

The petitioner claims, that under a contract made February 10, 1852, between one Wozencraft, commissioner and Indian agent on the part of the United States, he (the petitioner) sold to the United States nineteen hundred head of beef cattle, to be delivered between the Mokenlumne river and the Four rivers when and as the same should be required by said Wozencraft, at the price of fifteen cents per pound, to be paid in bills drawn by Wozencraft upon the Secretary of the Interior.

And the petitioner avers in his petition that he delivered the said nineteen hundred head of cattle, weighing 883,333⅓ lbs., which, at the contract price, amounted to the sum of one hundred and thirty-two thousand and five hundred dollars; that said Wozencraft gave him the seven drafts or bills drawn on the Secretary of the Interior, and which are specified in the petition, and amounted to the said sum of $132,500; that the bills were presented to the Secretary of the Interior for payment, and were protested for non-acceptance and non-payment in the month of March, 1852, and the bills are now in the possession of the petitioner, and exhibited in the case.

The petitioner claims on the contract of sale and for the cattle delivered, and not on the bills or drafts. A paper purporting to be the contract, and referred to in the petition as Exhibit A, was produced, but proof of its execution was not made; it is annexed, and marked Exhibit A.

But O. M. Wozencraft, in his deposition taken in Washington March 24, 1856, in his answer to the 10th direct interrogatory, states: "I caused supplies of beef to be purchased of Samuel J. Hensley for various tribes of Indians in the San Joaquin valley. The quantity was nineteen hundred head of cattle, averaging in weight five hundred pounds each, at fifteen cents per pound."

By this statement the weight of the cattle delivered was 950,000 pounds, and the price $142,500, or $10,000 more than the sum alleged in the petition to be due, or the amount of the bills exhibited in the case.

But in the "vouchers" enclosed to the department by O. M. Wozencraft, September 18, 1852, are his certificate (dated 11th of February, 1852,) of the correctness of Hensley's bills against the United States for 1,900 head of cattle "furnished Indians," &c., of 500

pounds weight each, $142,500, and Hensley's receipt (dated February 11, 1852,) for drafts for $142,000. The discrepancy in the amount claimed in the petition and in the evidence is not accounted for otherwise than by the fact appearing on the petition that it was not signed by Mr. Hensley, but by his original counsel in the case.

In the argument for the petitioner at this term of the court it is contended that under the contract made by Hensley and Wozencraft there were delivered to Wozencraft 1,285 head of cattle, and to Lieutenant Beale, superintendent, 438 head, making in all 1,713 head of cattle, averaging 500 pounds in weight, which, at fifteen cents per pound, amounted to $128,475.

The delivery of 1,285 head of cattle to Wozencraft is testified to by M. B. Lewis, J. J. Visonhaller, and Lewis Leach, deponents for the petitioner, as made in May, 1852, to Major Savage, sub-Indian agent, and acting for Wozencraft; and these deponents all testify that the cattle delivered to Savage were slaughtered and distributed to the Indians, and declare that they are "familiar" with the matter of the distribution, and they thus swore positively to the slaughter and distribution of 1,285 head.

But it appears by the deposition of Lieutenant Beale, taken for the United States, that he received November 30, 1852, from O. M. Wozencraft, an order on Visonhaller for 212 head of cattle, and that he subsequently collected 212 head as left on hand or supposed to be lost out of the 1,285. There is nothing in the case from which it can be inferred that the disposition by Lieutenant Beale of these 212 ever came to the knowledge of either Lewis, Visonhaller, or Leach; yet the 212 were included in and made a part of the 1,285 head they testify were slaughtered and distributed to the Indians, and their inaccuracy in this respect weighs against their testimony where opposed by other evidence.

Then, as to the 408 head of cattle alleged to have been delivered to Lieutenant Beale, these deponents for the petitioner all swear to the delivery in the spring of 1853; but in what way they knew the fact or ascertained the number is not shown, for they were not cross-examined on these points or any other, and Lieutenant Beale in his deposition makes no mention of any such delivery to him, and mentions only the receipt of 212 head, collected by him as above stated' although he answers under the broad interrogatory (5th): State if you know anything connected with the claim of Major Hensley against the United States for cattle supplied to the Indians in California; and if yea, what it was.

Lieutenant Beale says in his deposition: "From all that I could learn when I was in California as superintendent of Indian affairs I have every reason to believe that the claim of Major Hensley against the United States is a just one." But there is no evidence in the case that Lieutenant Beale knew of any claim of Major Hensley's, beyond that specified in the account he annexed to his deposition, as received from Visonhaller, for 1,285 head of cattle. And Lieutenant Beale's deposition is not an official report, and his *opinion* is not evidence here, whatever weight it may be entitled to elsewhere. As a witness his only authority was to state *facts* as distinguished from *opinions*.

Mr. Wozencraft, in his deposition, testifies to the delivery of the whole nineteen hundred head of cattle, but his statements, when collated with his answers to Lieutenant Beale, set forth in Doc. 4, p. 368, appear to be made without personal knowledge of the facts.

We are of opinion that the evidence, when allowed all its proper force, shows the delivery under the contract of only 1,285 head.

S. Doc. 4, p. 389, shows that Lieutenant Beale, November 30, 1852, received an order on Samuel Hensley for 612 head of government cattle, and (S. Doc. 4, p. 405, November 20, 1852,) Mr. Wozencraft speaks of them as then "in charge of Major Hensley." There is no evidence in the case that any of these were received by Lieutenant Beale; and that they were not is the inference, from the fact that Lieutenant Beale, in his deposition taken in September, 1856, mentions the 212 head of cattle collected by him, and referred to in the order given on Visonhaller at the same time with the order on Hensley, and makes no mention of this latter order or any receipt under it.

The statement of Joel H. Burkes (S. Doc. 57, p. 5) is not shown, and does not appear to attach to the cattle sold by Major Hensley.

As to the weight of the cattle sold by the pound, there is no evidence that they were actually weighed, and the testimony in the case (S. Doc. 61, p. 17) shows that the custom of the country was to take the estimate of persons on the ground. Five hundred pounds seems to have been fixed upon as the average weight of the cattle sold in California.

The price of fifteen cents per pound is shown to have been a reasonable price at the time by the deponents for the petitioner in this case, and by the documents in evidence, (S. Doc. 61, p. 17; S. Doc. 4, pp. 16, 17, 18.)

It is shown in Senate Doc. 4, pp. 95, 96, that the treaty with these Indians, for whose supply the contract in this case was entered into, was made and concluded April 9, 1851, and the terms of the treaty as to supplies of food for the Indians in 1851 and 1852, are there mentioned.

It is claimed that the United States are bound to pay for the 212 head of cattle collected and received by Lieutenant Beale. The reasons and the mode of the action of Lieutenant Beale are shown in Senate Doc. 4, p. 367; and in his receipt for the cattle, p. 359, he states: "All of the above to be held by me, subject to the decision of the department." What that decision was is not shown. There is no evidence that these cattle were ever returned to Mr. Hensley, or paid for by the United States. But the United States cannot be charged by the acts of its officers not within the line of their duty, and there is no evidence that Lieutenant Beale or the department were authorized to make purchases for the Indians *on the credit* of the United States, or to adopt or approve contracts so made.

We are of opinion that the case must be decided on considerations common to the class of cases to which it has been said it belongs, and irrespective of its peculiar circumstances or merit; and that in this case, as in each of its class, the question is whether the contract claimed upon is the contract of the United States, as made or adopted by their authority.

The whole authority of the commissioners *as such* was "to hold treaties with various Indian tribes in the State of California," and the

meaning of "the terms *to hold treaties*" is clearly defined and precisely limited by the provisions of the constitution and the uniform practice under it, by which the executive is authorized to mould the terms of treaties, while the consent of the Senate is necessary to give them the sanction of law, authorizing action under them. It is entirely clear upon the evidence that the contracts claimed upon were made, and the supplies claimed under the contracts were furnished months after the treaties to which they are referred had been agreed upon and reduced to writing and signed, and their formal execution as mere documents completed; and with such execution the holding of the treaties was necessarily and entirely fulfilled, and the functions of the commissioners under the terms of their commission were determined, and for any further action on their part there was no authority in the words of their commission.

It was claimed that the treaties could not have been held or made without stipulations for these supplies of provisions in aid of the subsistence of the Indians. But the evidence does not show this; on the other hand, it tends to show that the Indians were willing to enter into treaties, but were unwilling to remove from their homes into the reservations, and it was only their removal which made the stipulations of the supplies necessary. In the report of the commissioners dated March 28, 1851, (S. Doc. 4, pp. 69, 70,) in describing the course of their negotiations with the Indians, they state: "When we again met them they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and that we could treat with them on no other condition, believing that, if they were permitted to remain in the mountains, constant conflicts between the Indians and whites would take place." This official report, made at the time of the transactions, is the best evidence of their circumstances and purpose. Besides, this removal of the Indians on to reservations was the policy of the commissioners agreed upon and adopted on consultation by them before negotiating with the Indians, and before they entered the Indian country.—(S. Doc 4, pp. 50, 60, 63; Doc. 61, p. 2.) And it was suggested to the department by Commissioner McKee, (Doc. 4, p. 53,) as early as December 1, 1850, and more than three months before any treaty was made or proffered. And all this tends to show that the removal of the Indians to the reservations was a condition enforced upon them by the commissioners, and that with the Indians it was not a requirement, but an objection, in the treaties made.

Then it is said that the department approved the policy of the commissioners in removing the Indians to the reservations, and thereby adopted the act and its direct consequence of furnishing them with provisions there.—(Doc. 4, pp. 15, 20.) And thus, the question is, whether it was in the power of the executive, under all the circumstances of the case, to authorize or adopt these contracts.

Under the clause in the Constitution which authorizes the President to make treaties, the power of the President is like that of the commissioners here, to *hold treaties* only, and the Executive, therefore, had no more authority than the commissioners to carry those treaties into

execution before their ratification by the advice and consent of the Senate.

The circumstances of the case are claimed to be, that a strife, destructive of life and property and threatening the peace of the country, was raging in the State of California, and the question is whether to end this strife by separating the parties to it, the Executive could use the means these commissioners used, *of pledging the credit of the United States.*

The Constitution gives to the Executive no such power in terms, and the provisions and purpose of the Constitution preclude its implication. The power in the Executive to pledge the credit of the country would render nugatory the provision of the Constitution that "no money shall be drawn from the treasury but in consequence of appropriations made by law," and would baffle the extended purposes of that provision. The power, if implied to any degree, must be to every degree, and would place the resources of the country at the disposal of the Executive, and this would change the operation of the government which the Constitution expressly makes. Admitting, therefore, all the plaintiffs claim, that the department charged with the management of Indian affairs approved the policy of the commissioners, and adopted its consequences, yet that gave to the commissioners no power to pledge the credit of the United States; such a power belongs exclusively to the Congress of the United States.

But the commissioners were also Indian agents, and it is claimed that the power to make these contracts was, under the circumstances, within their official authority as Indian agents.

The statute of the United States, June 30, 1834, (Stat. at L., vol. 4, p. 757, sec. 7,) enacts as follows: "And it shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law, to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendant of Indian affairs, and to carry into effect such regulations as may be presented by the President."

The general terms "to manage and superintend the intercourse with the Indians," &c., cannot in this statute be construed to involve the power to make any purchases for or on account of the Indians, because that subject is specifically provided for, in all cases contemplated by the statute, in the 13th section, which appoints specific agencies for the purpose of making purchases, and, to guard against frauds, makes express and careful provisions for the delivery of all articles purchased; and these specific agencies, and the plain purposes of the 13th section, would be rendered nugatory by construing that the power to make purchases and distribute articles purchased was involved in the general terms of the 7th section, to "manage and superintend intercourse with the Indians."

It may be that the cases in which these contracts were made were not contemplated in the 13th section, and that therefore they may not be directly within its provisions; but there is nothing to show that they were contemplated in the 7th section. And if the general terms, "manage and superintend intercourse with the Indians," do not in-

clude power to make purchases for the Indians in cases contemplated in the statute, they cannot be construed, of their own force, to involve such power in cases not contemplated by the statute.

By the remaining clause of the 7th section, the agents and sub-agents are "to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as may be prescribed by the President." But if there is no power in the Executive to pledge or dispose of the credit of the United States, no regulations or instructions from any of the executive officers mentioned in this section of the statute, and no rules of the Indian bureau could authorize agents or sub-agents to make these contracts.

It is claimed that the contract in this case has been affirmed by Congress, and appropriations made for its payment, in the act of August 30, 1852, and subsequent appropriation acts.

In the act of 1852, all that relates to California is in these words:

"For the preservation of peace with the Indians who have been dispossessed of their lands in California, until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars: *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their land in California."

The argument for the petitioner is, that this statute was intended to provide for obligations of the United States, "to feed and support the Indians *in* 1852;" the proviso expressly declares, no such obligation shall be implied from the act. Then the statute denotes in terms the period to which its appropriation is to be applied. It speaks of course from its date, August 30, 1852, and says its provision is for the preservation of peace *until* the *future* settlement of the Indians, and is thus on its face prospective merely.

The act of 1853 authorized *new reservations* for the Indians, and then provided means for their removal to these new reservations, and for their subsistence there; and the subsequent acts are all expressly in continuance of the same measures. And from all the acts, and the evidence in the case, the conclusion is, that the United States rejected the treaties and repudiated the reservations and measures of the commissioners, and substituted other reservations and measures, and provided for them and for them only.

Then it is said that the United States have surveyed and assumed title over the lands ceded by the Indians in the treaties made by the commissioners, and thus substantially affirmed the treaties. It is enough to say, that it is a part of the case that all those treaties were rejected by the Senate, and never came into existence as a means of title or of claim of title; and whatever may have been the action of the United States, there is no reason shown for referring it to any claim of title founded on those rejected treaties.

It was argued for the petitioner that the relation of the United States to the Indians was analogous to that of guardian and ward at the common law, and that the supplies furnished to the Indians were thus in

performance of legal obligations of the United States. If the analogy could be sustained, the argument founded on it was answered at the bar, that the obligation of a guardian was only to apply the ward's means to his support, and not to furnish means. But the analogy does not exist, for the relation of guardian and ward is a personal relation and cannot exist between nations, whose relations are by treaty and compact between themselves. The liability of a guardian for his ward's support rests on the fact that he holds all the ward's means of support. But the United States were not entitled to the rents or profits of the lands, or the goods and chattels of the Indian tribes or nations in California.

And upon the whole case we are of opinion that the United States are not legally liable upon the contract claimed upon, because it was not made by their authority, and has not been adopted by them.

Our decision is, that the petitioner has not established a title to the relief he prays for.